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Nos. 89-1027 and 89-1028

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NORFOLK AND WESTERN RAILWAY COMPANY, *et al.*,
Petitioners,

v.

AMERICAN TRAIN DISPATCHERS ASSOCIATION, *et al.*,
Respondents.

CSX TRANSPORTATION, INC.,
Petitioner,

v.

BROTHERHOOD OF RAILWAY CARMEN, *et al.*,
Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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JOINT APPENDIX

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PETITIONS FOR CERTIORARI FILED DECEMBER 28, 1989
CERTIORARI GRANTED MARCH 26, 1990

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NOTATION REGARDING ITEMS PREVIOUSLY REPRODUCED

The opinions, decisions, judgments, and orders indicated below have been omitted in printing this joint appendix because they appear, at the pages indicated below, in the appendix to the printed Petition For A Writ of Certiorari in case number 89-1027 and/or in the separately bound appendix to the printed Petition For A Writ of Certiorari in case number 89-1028.

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Decision, *Norfolk Southern Corp.—Control—Norfolk & Western Ry. and Southern Ry.*, ICC Finance Docket No. 29430 (Sub-No. 20), May 24, 1988 ..... 29a (89-1027)

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30a (89-1028)

Order, *Brotherhood of Railway Carmen v. Interstate Commerce Commission*, D.C. Cir. No. 88-1724, and *American Train Dispatchers' Association v. Interstate Commerce Commission*, D.C. Cir. No. 88-1694, September 29, 1989 (denying suggestions of rehearing *en banc*) 51a (89-1027)
31a (89-1028)

Order, *Brotherhood of Railway Carmen v. Interstate Commerce Commission*, D.C. Cir. No. 88-1724, and *American Train Dispatchers' Association v. Interstate Commerce Commission*, D.C. Cir. No. 88-1694, September 29, 1989 (deferring consideration of ICC petition for rehearing) 53a (89-1027)
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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

American Train Dispatchers' Association v. ICC, et al., No. 88-1694, United States Court of Appeals for the District of Columbia Circuit

09-20-88 Original Proceedings Transferred from the USCA for the Eleventh Circuit.

10-27-88 Petitioner's motion to consolidate cases 88-1694 and 88-1724.

11-25-88 Per Curiam order that the motion to consolidate cases 88-1694 and 88-1724 is denied. The Clerk is directed to schedule these cases for oral argument on the same date and before the same panel. The Clerk is directed to file a copy of this order in both cases. Mikva, Buckley and D. H. Ginsburg, CJs.

04-17-89 Per Curiam order granting intervenors' motion for leave to participate in oral argument. Intervenors shall have 5 of respondent's 15 minutes for argument.

04-25-89 ARGUED before Chief Judge Wald, Edwards and D. H. Ginsburg, CJ's.

07-25-89 Opinion for the Court filed by Circuit Judge D. H. Ginsburg.

07-25-89 ~~Judgment by this Court that the petition for review is granted in part and the case is remanded, in accordance with the Opinion for the Court filed herein this date.~~ Inadvertently entered. See order of 9/29/89.

07-25-89 Mandate order.

09-08-89 INTERVENORS' petition for rehearing and suggestion of rehearing *en banc*.

09-08-89 Petition of Interstate Commerce Commission for rehearing.

09-29-89 Per Curiam order that the opinion of the Court filed July 25, 1989 is amended.

09-29-89 Per Curiam order that the petitions for review are granted in part and the records herein are remanded to the Commission for further proceedings, in accordance with the Opinion of the Court filed herein this date. PMW, HTE, DHG.

09-29-89 Per Curiam order that the Clerk is directed to file petitioners' lodged response to the petition for rehearing. Further ordered that consideration of the petition for rehearing is deferred pending release of the ICC's decision on remand. PMW, HTE, DHG.

09-29-89 Per Curiam order that the suggestion for rehearing *en banc* is denied.

09-29-89 Per Curiam order that the petitions for rehearing are denied. PMW, HTE, DHG.

01-08-90 Notice from the Supreme Court of filing of petition for certiorari.

03-27-90 Letter from Clerk's Office, US Supreme Court, forwarding certified copy of 3/26/90 Supreme Court Order allowing certiorari (S.Ct. No. 89-1027, consolidated with 89-1028). 1 hour allotted for oral argument (DC Cir. Nos. 88-1694 and 88-1724).

03-27-90 Letter from Clerk's Office, US Supreme Court, forwarding certified copy of 3/26/90 Supreme Court Order allowing certiorari (S.Ct. No. 89-1028, consolidated with 89-1027). 1 hour allotted for oral argument (DC Cir. Nos. 88-1694 and 88-1724).

Brotherhood Railway Carmen v. ICC, et al., No. 88-1724, United States Court of Appeals for the District of Columbia Circuit

10-05-88 Original Proceedings Transferred from the USCA for the Eleventh Circuit.

10-27-88 Petitioner's motion to consolidate cases 88-1694 and 88-1724.

11-25-88 Per Curiam order that the motion to consolidate cases 88-1694 and 88-1724 is denied. The Clerk is directed to schedule these cases for oral argument on the same date and before the same panel. The Clerk is directed to file a copy of this order in both cases. Mikva, Buckley and D. H. Ginsburg, CJs.

04-17-89 Per curiam order granting the motion of CSX for leave to participate in oral argument. Intervenor CSX shall have 5 of respondent's 15 minutes for argument.

04-25-89 ARGUED before Chief Judge Wald, Edwards and D. H. Ginsburg, CJ's.

07-25-89 Opinion for the Court filed by Circuit Judge D. H. Ginsburg.

07-25-89 ~~Judgment by this Court that the petition for review is granted in part and the case is remanded, in accordance with the Opinion for the Court filed herein this date.~~ Inadvertently entered. See order of 9/29/89.

07-25-89 Mandate order.

09-08-89 Petition of Intervenor CSX Transportation, Inc. for rehearing and suggestion for rehearing *en banc*.

09-08-89 Petition of Interstate Commerce Commission for rehearing.

09-29-89 Per Curiam order that the opinion of the Court filed July 25, 1989 is amended.

09-29-89 Per Curiam order that the petitions for review are granted in part and the records herein are remanded to the Commission for further proceedings, in accordance with the Opinion of the Court filed herein this date. PMW, HTE, DHG.

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Pursuant to Article I Section 4, N.Y. Dock II, Conditions - ICC Finance Docket No. 29430 (366 I.C.C. 171)

In the Matter of Arbitration

between

Norfolk and Western Railway Co.
Southern Railway Company

and

American Train Dispatchers Assn.

DECISION AND AWARD

Appearances

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Norfolk Southern Corporation

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Appointment

On March 19, 1982, the Interstate Commerce Commission (ICC) approved the application of Norfolk Southern (NS) to obtain control of the separate railroad systems of Norfolk & Western (N&W) and Southern Railroad (Southern) under Finance Docket No. 29430 (Sub.-No. 1). Included in the approval order was the requirement that New York Dock II Conditions apply.

On September 12, 1986, pursuant to New York Dock II conditions and the ICC order, N&W notified the American Train Dispatchers Association (ATDA) that it intended to transfer the work of supervising the locomotive power distribution and assignment from the N&W System Operations Center in Roanoke, Virginia, to Southern's Control Center in Atlanta, Georgia. Thereafter, the parties engaged in negotiations on October 7, 27, 28, and November 10 and 11, 1986, and were unable to reach agreement upon an implementing agreement. Unable to reach agreement upon a neutral referee, on December 4, 1986, N&W requested the National Mediation Board to appoint a neutral and by letter December 9, 1986, Robert O. Harris was nominated to sit as the neutral. The Carriers named R. S. Spenski, Assistant Vice President - Labor relations, as its member of the panel and the Organization designated H. E. Mullinax, Vice President, as its member. On May 13, 1987, the neutral and Carrier members of the panel were informed by R. J. Irvin, President of the American Train Depatchers Association that due to the unavailability of Vice President Mullinax on the scheduled date for an executive session of the panel, "I am appointing Mr. W. G. Mahoney to replace Mr. Mullinax as our member of the arbitration board."

The parties submitted pre-hearing briefs, a hearing was held on February 27, 1987, in Roanoke, Virginia, and the parties then submitted post-hearing briefs. The panel has met twice in executive session and the matter is now ready for decision.

Background

The N&W was itself formed as the result of several mergers in the 1960's. ATDA had agreements with each of the railroads which had merged into N&W. The agreements contained scope language which stated that the Assistant Chief Train Dispatcher would "supervise the handling of trains and the distribution of power and equipment incident thereto; and to perform related work." Accordingly, the Assistant Chief Train Dispatchers issued instructions to mechanical department personnel regarding the number and identity of locomotives to be used on trains originating at their respective terminals. ATDA did

not represent Train Dispatchers on the original N&W. Following the merger the N&W "power bureau" assumed responsibility for all of the merger carriers and the ATDA represented dispatchers were no longer assigned the work in question. ATDA appealed this assignment and the Third Division of the National Railroad Adjustment Board issued an award which sustained the position of ATDA. Thereafter, an agreement was reached between N&W and ATDA that the supervisors who worked out of the "power bureau" would be represented by ATDA.

The Southern, which controls its distribution of power out of Atlanta, utilizes Superintendents of Transportation, who are nonagreement officers. It has done so for at least 22 years with such personnel.

Facts

After the merger, Norfolk Southern determined to consolidate all of the control functions for the entire system in one location. Mr. J.R. Martin, Senior Assistant Vice President, Transportation Planning, of the Southern testified that Atlanta was chosen and that all of the control functions involved in the movement of cars and the assignment of costs when other railroads utilize NS tracks already have been transferred to the control center there. The only remaining consolidation is the one involved in this dispute, the assignment of locomotive power. Mr. Martin indicated that a single control center would effect efficiencies in the utilization of motive power of about one per cent. With 2,200 locomotives, this would mean 22 less locomotives would be needed, a saving of $26 million in capital investment and a saving of $2 million a year in operating expenses. This does not include savings in labor cost which would be realized. Mr. Martin further testified that because the two systems were operated separately the accounting functions were carried in the same manner as if they were independent companies and locomotives

were only transferred between the railroads in large batches rather than singly.

Mr. H. H. Bradley, Assistant Vice President of Transportation of the Southern, testified that he was in charge of the Control Center in Atlanta. He described the job of Superintendent of Transportation - Locomotive (STL) as follows:

> The STL when he comes on duty would discuss with the off-going STL anything unusual that has occurred during the prior eight hours of an exceptional type nature.
>
> He would then start pulling up his screens on the CRT looking at inventories of locomotives at the major hump yards where the majority of the engines are located. These are electronic hump yards. They look at the inventory and see if there is anything unusual. The STL would know the schedules of the trains for which he has to provide locomotives.
>
> We have an operating plan over the system, and in a normal situation the locomotives cyclicly move from one train to another train to another train and then complete the cycle. And he would have to look for exceptions, if he had a mechanical failure. And then he would have to supply another locomotive.
>
> Then he looks and starts talking with the Chiefs in addition to a tonnage report he has available to see if we have any unusual amount of traffic. He looks to see if there have been any trains annulled that are not to be operated, that have provided extra power, or there may be a problem where there is no power at the end of a normal run, if the train has been canceled.
>
> Looking at these by division, knowing his inventory and knowing the train schedules, he will actually assign locomotives by number into the CRT in many

cases. But that is done generally with discussion with the Shop Foreman who knows which engines have been serviced, which engines are on the fuel rack. He has some of this conversation to make sure that he minimizes his switching.

Mr. Bradley further indicated that at the present time the NS system is operated with two regions—Northern (N&W) and Southern (Southern). When consolidation takes place it will be possible to change this system and there is consideration being given to not only rationalizing the system between North and South—they are now generally divided but there are some anomalies because of the trackage of the two railroads—but also to having the system configured into East and West regions instead. He also indicated that he believes that each of the STL jobs should be interchangeable and that an individual should be able to shift from one region to another.

Mr. Bradley noted that the differences between the STL's and the System Operations Center (SOC) Supervisors are in the tools which the STL uses. Because the STL utilizes the CRT, he has the ability to communicate with other members of the railroad, while the SOC board is an informational system that is available only to the people standing in the SOC.

The pay of STL's is about ten percent higher than that of SOC Supervisors although it cannot be exactly compared because the benefit packages are different and each STL has his salary set by his manager. It may be different from any other STL's salary.

Contentions of the Parties

It is the position of the Organization that it has represented the SOC Supervisors who perform power distribution duties on the N&W under an agreement entered into April 1, 1971, and that the transfer of work involved

in this proceeding was not included within the list of jobs which the merged carrier intended to "abolish, create or transfer as a result of ICC approval of its application for joint control" in Finance Docket No. 29430 (Sub.-No. 1). It is the organization's position that the transfer of these jobs is not allowable under the ICC order and that the ICC and this Arbitration Panel have no authority to change wages, rules, or working conditions of employees which are protected by the Railway Labor Act and Section 11347 of the Interstate Commerce Act (49 USC 11347).

It is the Organization's second contention that even if its first contention is not agreed to, the ICC "has never claimed for itself the extraordinary statutory power to eliminate Railway Labor Act and collective bargaining agreement rights of entire classes of employees." It further contends that even if the ICC has such power, it could only be exercised where necessary to effectuate a transaction approved by the ICC and this transaction, the transfer of SOC employees, was never presented to the Commission for approval.

Finally, the Organization contends that this Arbitration Panel, created under the ICC's New York Dock II decision, "explicitly commands preservation of Railway Labor Act and collective bargaining agreement rights. Section 2 of Appendix I states:

> The rates of pay, rules, working conditions, and all collective bargaining and other rights, privileges, and benefits (including continuation of pension rights and benefits) of a railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

The Organization states that even if one were to assume otherwise and also assume that the proposed SOC transfer had been presented to and approved by the ICC, that those

assumptions could not be used as a basis for the elimination of collective bargaining and Railway Labor Act rights because the continued existence of those rights does not subject the proposed SOC transfer "to the risk of nonconsummation as a result of the inability of the parties to agree on a new collective bargaining agreement" as required by the ICC decision in the *Maine Central* decision.

The Carriers contend that the Organization's procedural arguments are without merit. They state that the Arbitration Panel has authority under Section 4 of New York Dock II to fashion an implementing agreement. The Carriers further contend that the argument regarding Section 2 is without merit since recent ICC decisions have refuted the Organization's contention and decisions have been issued by various referees under the authority contained in the ICC decisions. The Carriers also contend that the rearrangement of forces which is the subject of this dispute is an appropriate rearrangement under the authority granted the Carriers by the ICC decision allowing their joint control.

Finally, the Carriers contend that the Implementing Agreement which they proposed is an appropriate basis for this rearrangement of forces.

Discussion

I.

As noted by the Organization, this is an unusual rearrangement of forces since it combines employees who have chosen to be represented for the purposes of collective bargaining with other employees who are not so represented. However, like all other New York Dock cases, the Panel must first look to its own authority to act.

As noted above, this proceeding is the result of a request by the Carriers in accordance with the ICC decision which allowed joint control of the Carriers. In its decision, the ICC (366 ICC 171, 230) stated:

> We find that the applicants' estimates of employee impact are reasonable. What dislocations there will be appear to be short term. It is possible that further displacement may arise as additional coordinations occur. However, no wholesale disruption of the carriers' work force should occur and the overall disruption is clearly not unusual in comparison to other rail consolidation transactions.

It noted further (366 ICC 171, 231):

> We find that the minimum statutory protection of *New York Dock* is appropriate for the protection of applicants' employees affected by this proceeding without any of the suggested modifications.

The basic questions, then, are whether the type of consolidation desired by the Carriers was authorized by the ICC in its decision and if it was, what are the protections afforded by New York Dock.

The Organization has contended that the consolidation of the Roanoke SOC with the Atlanta Control Center was not part of the original submission of the Carriers in which they listed the expected consolidations which would be made if the joint control was approved by the ICC. The Organization believes that only the actual consolidations specifically approved by the ICC were authorized; any other consolidation is outside the scope of the ICC decision. The language quoted above seems to belie that contention since it specifically states: "It is possible that further displacement may arise as additional coordinations occur." Had the ICC not believed that there would be additional coordinations, beyond those which had been listed in the submissions to it, it would not have needed to put that sentence into its decision. And having put it in, it must have had a reason—the general approval of coordinations which would meet the goal of greater efficiencies upon which the rationale of the decision was based. At the hear-

ing, testimony was received which indicates that there will be a substantial saving to the combined carrier through the planned coordination, both in capital costs since fewer locomotives will be needed and also since operating costs of the remaining locomotives may be reduced through their more efficient utilization throughout the entire system. This Panel concludes that the instant coordination was authorized by the ICC and that the question before the Panel is the application of New York Dock standards to that coordination.

The central issue in this case is the reconciliation of the conflict between Sections 2 and 4 of Appendix I to New York Dock. As noted earlier, Section 2 deals with the right of the employees to continue to enjoy the protection of the Railway Labor Act and any agreements which may have been bargained by the collective bargaining representatives of the affected employees. Section 4, on the other hand, indicates the method by which a carrier may give notice of a change in its operations and the method of resolving disputes which may arise thereafter. This proceeding results from the application of Section 4, and its authority derives from that section.

Prior to 1981, the question of whether a carrier could, through a consolidation of forces, effect changes in rates of pay, rules, or working conditions had never been raised before an arbitrator in a Section 4 proceeding. Between 1981 and 1983 at least five arbitrators ruled that the ICC did not desire that changes of rates of pay, rules, or working conditions, or of representation under the Railway Labor Act occur through arbitration under Section 4 of the New York Dock conditions.[1]

---

[1] *N&W, Illinois Terminal RR. Co.* and *Railroad Yardmasters of America and UTU* (Sickles, 12/10/81); *N&W, Ill. Term. RR. Co.* and *BLE and UTU* (Zumas, 2/1/82); *N&W, Ill. Term. RR. Co.* and *UTU* (Edwards, 2/11/82); *B&O, Newburgh & So. Sh. Ry. Co.* and *BMWE, USW* (Seidenberg, 8/31/83); *B&O, Newb. & S. Sh. Ry. Co.* and *UTU BLE* (Fredenberger, 9/15/83).

On August 23, 1985, the ICC in the *Maine Central Railroad Co.* case (Finance Docket No. 30532) issued a decision in which it discussed the interrelationship of the ICC orders in consolidation cases and the Railway Labor Act. In that decision, the ICC stated:

> In *Southern Control*, the Commission observed that section 6 of the RLA "would seriously impede mergers," if it were not for the protections of WJPA that were essentially incorporated in the Commission's decision. 331 I.C.C. at 171. RLA thus had no independent effect. *Southern Control* was the Commission's response to a Supreme Court directive in *Railway Labor Executives' Association* v. *U.S.*, 379 U.S. 199 (1964), that the Commission clarify the scope of protective conditions imposed in a certain merger. It may be noted that the Court's concern was not with the provisions of RLA or WJPA (except as reflected in the Commission's order), but with the level of employee protection decreed by the Commission in its order. It is that order, not RLA or WJPA, that is to govern employee-management relations in connection with the approved transaction.
>
> Such a result is essential if transactions approved by us are not to be subjected to the risk of nonconsummation as a result of the inability of the parties to agree on new collective bargaining agreements effecting changes in working conditions necessary to implement those transactions. All of our labor protective conditions provide for compulsory binding arbitration to arrive at implementing agreements if the parties are unable to do so, so that approved transactions can ultimately be consummated. Under RLA, however, changes in working conditions are generally classified as major disputes with the results that there is no requirement of binding arbitration. See *REA Express, Inc.* v. *B.R.A.C.*, 459 F.2d 226, 230 (5th Cir. 1972). Since there is no mechanism for insuring that

the parties will arrive at agreement, there can be no assurance that the approved transaction will ever be effected. Such a result we believe is unacceptable and inconsistent with section 11341 of our act and with Section 7 of the RLA which provides that arbitration awards there under may not diminish or extinguish any of our powers under the Interstate Commerce Act.*

* For the same reason we reject the argument that the provision of our conditions requiring that working conditions not be changed except pursuant to renegotiated collective bargaining agreements reinvigorates the RLA and causes its provisions to supersede the mechanism for resolving disputes associated with negotiating implementing agreements contained in the labor protective conditions we impose on approved transactions.

Prior to, at the time of, and subsequent to this ICC decision, various arbitrators ruled that Section 4 effectively superseded the Section 2 protection contained in New York Dock and that new conditions could be imposed pursuant to such a Section 4 arbitration award.[2] It should be noted that in at least two cases arbitrators who had made earlier decisions regarding the interrelationship between sections 2 and 4 have changed their position.

In the *Union Pacific et al.* and *UTU* case, Arbitrator Brown opens his discussion of the case with the following:

> The jurisdiction of this arbitral committee is derived from the Interstate Commerce Commission, which derives its authority from Congress as set forth in Revised Interstate Commerce Act, 49 U.S.C.A. Secs. 11341(a) and 11347. This committee is a creature of ICC and is chartered to exercise a measure of the

[2] *N&W, et al.* and *UTU* (Ables, 9/25/85); *Union Pacific R.R. et al.* and *UTU* (Brown, 1/85); *C&O, Seaboard System RR.* and *Brotherhood of Railway Carmen* (Marx, 12/15/84); *Union Pacific et al.* and *American Train Dispatchers Association* (Fredenberger, 5/27/84); *BLE* and *Union Pacific et al.* (Seidenberg, 1/17/85)

> authority of ICC in order that final and effective resolution may be had in relation to multi-party disputes which will assuredly rise when employees compete for job assignments and union committees contest for troops and territory.
>
> The authority of this panel is circumscribed not by the Railway Labor Act, but by the mandate of the Interstate Commerce Commission, and, subject to the will of the ICC, we are commissioned to exercise its full authority to achieve a fair and equitable resolution of the dispute before us. The ICC's authority in cases such as that before us is plenary and exclusive.

The panel hearing the instant dispute has exactly the same authority as that noted by Arbitrator Brown, quoted above. Whatever may have been the view prior to the ICC decision in the Maine Central case, it is clear that the ICC believes that its order supersedes the Railway Labor Act protection. While it did not state specifically that the inconsistencies between Sections 2 and 4 of the New York Dock conditions are to be resolved in favor of Section 4, that conclusion is inescapable. Furthermore, as a creature of the ICC, this panel is bound to the ICC view. If that view is incorrect, it is to the courts, not this panel, that the Organization must turn for relief from this newly evolved reconciliation of the conflict between the two sections.

The Organization has raised another point which is worthy of discussion. It states that the ICC cannot take away the collective bargaining rights of the employees involved in the coordination and that the effect of this coordination is exactly to do that. This argument bears analysis. It is clear that if the employees who are moved to Atlanta are consolidated with the present Atlanta employees, the present collective bargaining agreement between N&W and ATDA may not be carried along; however, this does not change the rights of individual employees. Nor does it

eliminate a class of employees, since that class was never recognized through an election under the auspices of the National Mediation Board. If, as the ATDA claims, the Superintendents of Transportation are employees or subordinate officials within the meaning of the Railway Labor Act, they, as individuals, will have the right to petition the National Mediation Board for the selection of a representative for the purposes of collective bargaining. What is lost by the transfer is the incumbency status of the ATDA, a status arrived at through recognition, not through election. The protections afforded by New York Dock are to individual employees, not to their collective bargaining representatives. Whatever rights the ATDA may have under the Railway Labor Act as an "incumbent" bargaining representative are for determination by the National Mediation Board, not this panel. The NMB has exclusive jurisdiction over representation matters. See the Order by Justice O'Connor (A-716) of April 2, 1987 in *Western Airlines, Inc. and Delta Air Lines, Inc.* v. *International Brotherhood of Teamsters and Air Transport Employees*, ___ U.S. ___ (1987). Motion to vacate the stay orders was denied by the full Supreme Court on April 6, 1987.

II.

The Carriers offered a proposed implementing agreement on October 7, 1986. They offered a second proposed implementing agreement on November 11, 1986, and have submitted the latter as the agreement to be found appropriate by this panel.

The original Carrier agreement indicated that the new positions created in the SR Control Center would be offered first to N&W employees currently holding SOC positions in Roanoke. Those positions not filled would then be offered to other qualified N&W employees holding SOC seniority. It further indicated that N&W employees accepting positions would be relocated at the expense of the Carriers. Finally, it indicated that an employee who declines an offer of employment in the SR Control Center may exercise his seniority under applicable rules and agreements.

The second Carrier agreement proposes "NW employees currently holding SOC positions in Roanoke and other NW employees holding SOC seniority will, upon request, be given consideration for employment in the SR Control Center in Atlanta." It will also encompass all protections afforded by New York Dock conditions.

The basic difference in the two agreements is that the first agreement gives the first right to the new positions in Atlanta to SOC employees and the second only allows them to request consideration for employment in that city.

The Organization offered a proposed implementing agreement which would have continued the Organization as the representative of the transferred employees and any employees subsequently hired or promoted to the SR Control Center. It also contained provisions regarding the movement of household goods and the sale of homes of transferred employees

This panel may not change the terms of the New York Dock Conditions. Only the parties may by mutual agreement modify such conditions. Since the first Carrier proposal, that of October 7, 1986, and the Organization proposal both go beyond the terms of an implementing agreement set forth in New York Dock, the second proposed Implementing Agreement of the Carriers, that of November 11, 1986, will be placed in effect.

Award

The parties shall adhere to the Implementing Agreement as proposed by the Carriers on November 11, 1986, subject only to the following:

Within a period of 14 days following the date of this Award, the parties shall meet to determine if there are

any mutually agreeable revisions of the November 11, 1986, proposal. If no agreement is reached on any such changes during the above specified 14-day period, the Implementing Agreement shall be as proposed by the Carriers on November 11, 1986.

Robert O. Harris
Chairman and Neutral Member

R.S. Spenski
Carrier Member
[Concur]

W. G. Mahoney
Organization Member
[Dissent]

May 19, 1987

DISSENT OF ORGANIZATION MEMBER

I must dissent from the Decision and Award (Decision) dated May 19, 1987, which was drafted by the Chairman and Neutral Member and concurred in by the Carriers' Member.

The Decision sanctions the unilateral transfer of work from Norfolk and Western Railroad SOC Supervisors and Assistant Chief Dispatchers to non-agreement personnel on the Southern Railway. The subject work is exclusively reserved to N&W employees under numerous longstanding agreements between the American Train Dispatchers Association ("ATDA" or "Organization") and the railroads which now constitute the N&W system through merger. N&W employees' exclusive right to this work was confirmed by the National Railroad Adjustment Board, Third Division in Award No. 16556 (ATDA Exhibit No. 1). The transfer of the work creates a major dispute under the Railway Labor Act.

The Decision mischaracterizes the position of the ATDA; it is replete with factual and legal errors; it renders conclusions without attempting to justify them; and, it reaches contradictory conclusions regarding the jurisdiction of the National Mediation Board, for it usurps that jurisdiction by stripping from the SOC Supervisors their representation rights while holding that the National Mediation Board "has exclusive jurisdiction over representation rights" of the ATDA.

Indeed, if this be a valid award, all future arbitrations under Section 4 of the *New York Dock* conditions have been rendered futile for it has laid a foundation upon which the railroads can erect corporate edifices unburdened by rules of law or statutory or contractual provisions; all will be superseded by the "automatic exemption" provisions of Section 11341(a) of the Interstate Commerce Act.

On the issue of the employees' representation rights, the Decision is a gaggle of contradictions and unsupported conclusions. At page 9 the Decision identifies the SOC Supervisors as "employees who have chosen to be represented for the purpose of collective bargaining". At pages 14 and 15, it reaches a contrary conclusion in holding that the employees' loss of their representation rights and their collective bargaining agreement is no loss at all because their right to representation "was never recognized through an election under the auspices of the National Mediation Board." The distinction between "election" and "recognition" in the latter statement is itself contradictory of the historical rulings of the National Mediation Board, including those contained in its very recent decision in *TWA/Ozark Airlines*, 14 N.M.B. 215 (April 10, 1987).

The Decision first concludes at page 15 that the "present collective bargaining agreement [sic] between N&W and ATDA may not be carried along [when the work is transferred to Southern]" but gives no reason for that

conclusion;[1] and, then proceeds to the incredible conclusion, again unsupported, that the employees' loss of their agreements and their statutory representation "does not change the rights of the individual employees." The Decision finally concludes its discussion of the rights of the N&W employees by saying that those employees can, in effect, retrieve the rights they did not lose by petitioning the National Mediation Board for an election after they get to Southern, provided they can demonstrate the Southern work is that of "employees or subordinate officials within the meaning of the Railway Labor Act." (Decision, p. 15.)

The same paragraph concludes that the only loss occasioned by the transfer "is the incumbency status of the ATDA" (Decision, p. 15) and since that is not protected by *New York Dock* it need not be addressed. But if ATDA has any rights as an "incumbent baragaining representative" they "are for determination by the National Mediation Board, not this panel." The Decision, having stripped the N&W employees of their representation and Railway Labor Act rights, then reaches its final, incongruous conclusion that with regard to the Organization "the NMB has exclusive jurisdiction over representation matters."

The Decision errs in its confusion of the several contentions of the Organization and its failure to mention others.

At page 7, the Decision inaccurately characterizes the Organization's position as follows:

> "It further contends that even if the ICC has such power [to eliminate Railway Labor Act and collective bargaining agreement rights of entire classes of employees], it could only be exercised when necessary to effectuate a transaction approved by the ICC and

[1] Perhaps no supporting reason is offered because this conclusion would seem clearly contrary to established law. *BN, Inc.* v. *ARSA*, (7th Cir. 1974) 503 F.2d 58, 63.

> this transaction, the transfer of SOC employees, was never presented to the Commission for approval."

The position of the Organization was, and remains:

1. The ICC has no authority, and therefore a *New York Dock* arbitrator has no authority to extinguish the Railway Labor Act and collective bargaining agreement rights of employees. (ATDA Subm., pp. 12-14, 19-21; ATDA Brief, pp. 1, 7, 9-13.)

2. Even if the ICC might have such rights, it has never claimed the statutory authority to eliminate the Railway Labor Act and collective bargaining rights of entire classes of employees; in this case the entire class of SOC Supervisors on the N&W. (ATDA Subm., pp. 17-19, 21; ATDA Post-Hearing Brief, pp. 1-2, 4.)

3. If such authority existed it could be exercised only if necessary to carry out the transaction approved. (ATDA Subm., p. 19-20; ATDA Brief, p. 2, 5-6, 6 n.3, 7, 14, 17.)

4. The "approved transaction" was fully consummated or "carried out" when NS achieved control of N&W and Southern in 1982, therefore, no exemption authority could now be triggered or activated. (ATDA Subm., p. 18, 20.)

5. If the "approved transaction" was not simply approval of NS control of N&W and Southern but extended to particular changes in operations, services or facilities, the change involving the SOC Supervisors could not have been "approved" because it was never presented to the Commission and, in any event, the Interstate Commerce Act does not provide the I.C.C. with jurisdiction to approve such changes. (ATDA Subm., pp. 14-17, 19; ATDA Brief, pp. 2, 4-5.)

6. The Arbitration Panel and the parties are governed by the orders issued in the *NS Control* case which explicitly preserve the Railway Labor Act and collective bargaining rights of the employees in Section 2 of *New York Dock* and contain no contrary provisions or later orders from which the Organization could have appealed. (ATDA Brief, pp. 2,4,8.)

7. Assuming such authority to exist in the I.C.C. and the arbitrator, such superseding authority could not be exercised unless "necessary" to "carry out the transaction" and the implementing agreement submitted by ATDA demonstrated it was not "necessary" to strip SOC Supervisors of their rights in order to accomplish the transfer desired by NS. (ATDA Subm., pp. 19-20, 21-28; ATDA Brief, pp. 2, 3 nl, 5-6, 6 n3, 7, 14, 14 n7; Transcript of Hearing, pp. 191, 192, 203-204.)

This last argument of ATDA was rejected by the simple device of ignoring it.

Regarding the elimination of employee rights in the face of Section 2 of *New York Dock* which specifically preserves such rights and in the absence of any language in the orders governing the *NS control* case to indicate otherwise, the Decision concludes at page 11 that the "central issue in this case is the reconciliation of the conflict between Sections 2 and 4 of Appendix [sic] I to New York Dock." It then finds, after quoting extensively from the Commission's 1985 *Maine Central* decision and an arbitration decision reached thereafter, that Section 2 is now wholly meaningless. (See, Decision, p. 14.)

The Decision quotes from a 1985 decision of an Arbitrator Brown in which he states that arbitrators under *New York Dock* "are commissioned to exercise . . . [the] full authority [of the ICC] to achieve a *fair and equitable*

solution of the dispute before us",[2] but then reaches a result which is clearly unfair and inequitable. The Decision justifies this result by engaging in hypertechnical reasoning which defies even a cursory scrutiny. For example, the Decision determines that the employees have lost no rights because their representation on N&W resulted from "recognition, not election" and their "present collective bargaining agreement [sic] [which] . . . may not be carried along," involve rights of the Organization and not the individual employees. Another example is the Decision's conclusion that ATDA's proposed implementing agreement and the first of the two proposals submitted by NS have gone "beyond the terms of the New York Dock Conditions" presumably because they would give "the first right to the new positions in Atlanta to SOC employees".[3] Therefore, the Decision would impose the Carriers' second proposed implementing agreement which "only allows them [SOC Supervisors] to request consideration for employment in that city [of Atlanta]". (Decision, pp. 16-17.)

Article I, Section 4 of *New York Dock requires* the "transaction . . . [to] provide for the *selection of forces from all employees involved* on a basis accepted as appropriate . . . and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4." (Emphasis supplied.) Section 9 of *New York Dock requires* the carrier to pay the affected employee's moving expenses. There is nothing in *New York Dock*, any decision of the Commission, or any arbitration decision prior to this one which holds an arbitrator cannot impose a "fair and equitable" agreement or that he must accept a provision which vio-

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[2] Emphasis supplied. See also ATDA Brief, pp. 15-19 for analysis of authorities on "fair and equitable" requirements.

[3] No reason was given as to how the ATDA proposal exceeded *New York Dock* limitations.

lates Section 4 by merely "considering" employees for work taken from them. (Decision, p. 16.)

If one compares the explicit, simple English in which Sections 4 and 9 are couched with the statements on pages 16 and 17 of the Decision and follows that comparison with a review of the entire Decision and the record in this case, one is compelled to conclude that the Decision has fallen victim to egregious errors and would visit the bitter consequences of those errors only upon the N&W employees.

WM. G. MAHONEY
Organization Member of Arbitration Panel

May 19, 1987

ATTACHMENT "A"

(Revised November 20, 1986)

IMPLEMENTING AGREEMENT

BETWEEN

NORFOLK AND WESTERN RAILWAY COMPANY
SOUTHERN RAILWAY COMPANY

AND NORFOLK AND WESTERN EMPLOYEES

REPRESENTED BY

THE AMERICAN TRAIN DISPATCHERS ASSOCIATION

WHEREAS, Norfolk and Western Railway Company and Southern Railway Company have filed applications with the Interstate Commerce Commission ("ICC") in Finance Docket No. 29430 and related sub-dockets 1 through 6 ("FD 29430") seeking approval of the acquisition by Norfolk Southern Corporation ("NSC") (formerly NWS Enterprises, Inc.) of control of Norfolk and Western Railway Company and its carrier subsidiaries ("NW") and of Southern Railway Company and its carrier subsidiaries ("SR") and coordination of operations of NW and SR; and

WHEREAS, the ICC has approved the aforesaid Finance Docket and has imposed the employee protection conditions set forth in New York Dock Ry.—Control—Brooklyn Eastern District Terminal, 354 ICC 399 (1978), as modified at 360 ICC 60 (1970) ("New York Dock Conditions"), therein; and

WHEREAS, the Carriers have served notice on September 15, 1986 of their intention to coordinate certain NW work performed by NW employees in the System Operations Control (SOC) in Roanoke, Virginia into the SR Control Center in Atlanta, Georgia on or about December 15, 1986; and

WHEREAS, the parties signatory hereto desire to reach an implementing agreement consistent with Article I, Sec-

tion 4 of the New York Dock Conditions with respect to the transaction described in this agreement;

NOW, THEREFORE, IT IS AGREED, among NW, SR ("Carriers") and the American Train Dispatchers Association ("ATDA"), as follows:

ARTICLE I

Section 1

Effective fifteen (15) days after notice is given to NW employees in SOC, located in Roanoke, Virginia, with a copy to the General Chairman, the work performed by NW employees in SOC shall be coordinated into the SR Control Center in Atlanta, Georgia, as described in Attachment 1 to this Agreement.

Section 2

The notice provided for under Section 1 hereof will list the names, seniority dates and rates of pay of the regular occupants of the positions in SOC, Roanoke, to be abolished, and the positions to be established in the SR Control Center in Atlanta.

Section 3

Nothing in this agreement prevents the positions to be established in the SR Control Center in Atlanta from being established on the same terms and conditions as apply to other comparable positions in existence in the SR Control Center prior to the effective date of this Agreement.

Section 4

NW employees currently holding SOC positions in Roanoke and other NW employees holding SOC seniority will, upon request, be given consideration for employment in the SR Control Center in Atlanta.

ARTICLE II

Section 1

Any employee adversely affected by this transaction will be afforded the protective benefits prescribed by the New York Dock Conditions.

Section 2

An employee eligible for benefits under the New York Dock Conditions as a result of this transaction must file a claim therefor in writing with the officer(s) designated by the Carrier(s) within sixty (60) days following the end of the month for which a claim is filed on the claim form provided by the Carrier(s).

Section 3

Protective benefits shall cease prior to the expiration of the employee's protective period in the event of the employee's resignation, death, retirement, termination for justifiable cause, or failure to return to service upon recall.

ARTICLE III

This agreement shall become effective as of the date executed and constitutes the Implementing Agreement fulfilling the requirements of Article I, Section 4, stipulated in the New York Dock Conditions. Where rules, other agreements and practices conflict with this agreement, the provisions of this agreement shall apply.

Signed at Roanoke, Virginia this 11th day of November, 1986.

FOR THE AMERICAN TRAIN DISPATCHERS ASSOCIATION:	FOR NORFOLK AND WESTERN RAILWAY COMPANY:
General Chairman	Assistant Vice President Labor Relations
Approved:	FOR SOUTHERN RAILWAY COMPANY:
Vice President	Assistant Vice President Labor Relations

3/T-00871/rss

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 29430 (Sub-No. 20)

NORFOLK SOUTHERN CORPORATION—CONTROL—NORFOLK AND WESTERN RAILWAY COMPANY AND SOUTHERN RAILWAY COMPANY

Decided: June 5, 1987

On May 29, 1987, the American Train Dispatchers Association (ATDA) filed a petition for stay pending the Commission's review of the arbitration award in the matter of *Norfolk and Western Railway Company, Southern Railway Company, and American Train Dispatchers Association*, Award of Referee Harris, May 19, 1987.[1] Norfolk and Western Railway Company (N&W) and Southern Railway Company (Southern) filed a reply.

The arbitration process was invoked under the provisions of the employee protective conditions we imposed in connection with our approval of the acquisition of control by Norfolk Southern Corporation (NS) of N&W and Southern in *Norfolk Southern Corp.—Control—Norfolk & W. Ry. Co.*, 366 I.C.C. 173 (1982) (*Norfolk Southern Control*). The employee protective conditions imposed in that proceeding are those set forth in *New York Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979) (*New York Dock*).

At issue here is NS's coordination of the locomotive power distribution of N&W and Southern. NS will transfer N&W's locomotive power distribution supervisors, who are represented by ATDA, from N&W's Systems Operating Center at Roanoke, VA, to Southern's Control Center in Atlanta, GA, where they will work with Southern's power

[1] ATDA also filed a petition for review of the arbitration award. That petition will be considered in a subsequent decision.

distribution supervisors, who have historically been considered management and not subject to a collective bargaining agreement. The arbitration award imposed an implementing agreement to effectuate this coordination of forces.

The Commission's authority to review arbitration awards was recently asserted in *Chicago and North Western Transportation Company—Abandonment—Near Dubuque and Oelwein, IA*, ___ I.C.C. 2d ___ (1987) (*Oelwein*).[2] Pending our review of the arbitration award, we have been asked to stay the award's effectiveness. Assuming we have the authority to stay an arbitration award pending our review, although we are not so deciding that issue here, we conclude that a stay would not be justified.

In determining whether petitioner has demonstrated entitlement to a stay, we refer to the four factors identified in *Washington Metropolitan Area Transit Comm.* v. *Holiday Tours, Inc.*, 559 F.2d 1841 (D.C. Cir. 1977):

(1) that there is a strong likelihood that the movant will prevail on the merits;

(2) that the movant will suffer irreparable harm in the absence of a stay;

(3) that other interested parties will not be substantially harmed; and

(4) that the public interest supports the granting of the stay.

Petitioner's showing under the last three factors is unpersuasive, and its contention that it will likely prevail on the merits is at best arguable.

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[2] ATDA contends that arbitration awards under the *New York Dock* conditions are reviewable in the courts and that the Commission can participate in such disputes solely through court referral. In light of *Oelwein*, ATDA submitted its petition for stay to the Commission, but it states that it does so without prejudicing its right to judicial review.

In regard to prevailing on the merits, ATDA raises jurisdictional questions and a substantive question about the terms and conditions of the implementing agreement accepted by the arbitration panel. First, as to the jurisdictional issues, ATDA argues that: (1) the transfer of locomotive distribution functions from Roanoke to Atlanta was in violation of the Railway Labor Act (RLA), and the arbitration panel's authorization of the transfer was in excess of its jurisdiction; and (2) the Commission's approval of NS's control of N&W and Southern did not exempt the carriers from the RLA in regard to the subject transfer because (a) the coordination of locomotive distribution is not a transaction subject to approval by the Commission, and (b) the transfer was not specifically mentioned in the Commission's authorization in *Norfolk Southern Control*.

Petitioner has not shown that it is likely to prevail on its jurisdictional arguments. The arbitration panel's jurisdiction over the transfer stems from the Commission's jurisdiction over the transaction. The transfer is not subject to the RLA because the Commission, in *Norfolk Southern Control*, authorized the coordination of N&W and Southern under NS, subject to *New York Dock*. The mandatory arbitration provisions of *New York Dock* take precedence over the RLA dispute resolution procedures in transactions approved by this Commission. See Finance Docket No. 30532, *Maine Central Railroad Company, Georgia Pacific Corporation, Canadian Pacific Ltd. and Springfield Terminal Company—Exemption from 49 U.S.C. 11342 and 11343* (not printed), served September 13, 1985. The proposed transfer, although not specifically mentioned in *Norfolk Southern Control*, is one of the future coordinations expected to flow from, and is therefore part of, the control transaction that we approved. Indeed, the coordination of locomotive power is precisely the type of action that might reasonably be expected to flow from the control transaction. *See* arbitration decision, pp. 10-11. The

arbitration panel, citing *Maine Central*, correctly exercised its jurisdiction over the dispute arising from the transfer.

Second, ATDA argues that the arbitration panel made a substantive error in accepting verbatim the terms and conditions of an implementing agreement proposed by the carriers. ATDA had proposed that the *New York Dock* conditions be imposed along with certain other conditions. Furthermore, at first the carriers had also proposed expanding the *New York Dock* protections with additional conditions. However, the carriers' later proposal included only *New York Dock* conditions. The arbitration panel found that it was not authorized to "change the terms of the *New York Dock* conditions" and placed into effect the later proposed implementing agreement of the carriers since the other two proposals "go beyond the terms of an implementing agreement set forth in *New York Dock*." This raises an interesting, and perhaps significant, issue concerning the authority of the arbitration panel to set the terms and conditions of the implementing agreement. We cannot determine at this time, however, whether petitioner's position on this issue will likely prevail. Even if we were to assume that it would, we still conclude that the other stay factors do not weigh in favor of granting a stay.

Petitioner has not demonstrated that in the absence of a stay it will suffer irreparable harm. ATDA argues that its members who are affected by the transfer will be irreparably harmed because they will be compelled to move from Roanoke to Atlanta, that those employees who transfer will lose the protections of their collective bargaining agreements while the petition for review is pending, and that those employees who choose not to transfer will, by exercising their seniority rights, displace other employees.

ATDA's arguments are not persuasive. The potential harm that they foresee is not irreparable. If employees were to suffer monetary damage attributable to the move,

petitioner has not shown why it is not possible for those employees to be adequately compensated under the *New York Dock* conditions. Since employees transferred to Atlanta will have an opportunity to obtain representation, it has not been shown that the employees will be foreclosed from receiving protections under a new collective bargaining agreement. Furthermore, N&W and Southern have indicated that the involved employees (except for one retiring employee) have elected to transfer to Atlanta and thus no employee displacement will occur.

As to harm to other parties, the record shows that N&W and Southern will realize a $26 million capital investment saving and an annual $2 million operating expense saving, exclusive of labor cost savings, from the coordination. To stay the transfer would delay the coordination and thereby prevent the carriers from realizing these savings. In addition, the carriers indicate that they, as well as numerous N&W management employees have made certain preparations in expectation of the transfer and that additional costs would be incurred should the transfer be delayed. The N&W management employees have sold their homes or terminated their leases in Roanoke and purchased new homes or entered into leases in Atlanta. Additional costs would have to be incurred for the N&W management employees to retain residences in Roanoke. The carriers have installed computer and telephone equipment in Atlanta; if they are unable to effectuate the transfer on June 6, 1987, the carriers will incur additional computer and telephone costs to relay distribution information to Roanoke.

Petitioner has also failed to show that the public interest favors a stay. The Commission, in *Norfolk Southern Control*, has found that coordination of the carriers is in the public interest. The economies to be realized by this coordination will benefit the carriers and the shipping public. To stay the transfer would delay these economies that have already been shown to be in the public interest.

This decision will not significantly affect the quality of the human environment or energy conservation.

It is ordered:

1. The petition for stay is denied.

2. This decision is effective on the date served.

By the Commission, Chairman Gradison, Vice Chairman Lamboley, Commissioners Sterrett, Andre, and Simmons. Commissioner Sterrett did not participate.

Noreta R. McGee
Secretary

(SEAL)

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 28905 (Sub-No. 22)

CSX CORPORATION—CONTROL—CHESSIE SYSTEM, INC. AND SEABOARD COAST LINE INDUSTRIES, INC.

Finance Docket No. 21215

SEABOARD AIR LINE R.R. CO.—MERGER—ATLANTIC COAST LINE R.R. CO.

Decided: June 5, 1987

On May 29, 1987, the Brotherhood Railway Carmen (BRC), Division of Brotherhood of Railway & Airline Clerks, filed an emergency motion to dismiss as moot the petition filed April 13, 1987, by CSX Transportation, Inc., (CSX) and The Chesapeake and Ohio Railway Company (C&O) for administrative review of an Arbitration Committee opinion and award.[1] BRC has also petitioned the Commission to order CSX to cease and desist from its proposal to implement on June 8, 1987, the coordination permitted by the Arbitration Committee determination. CSX and C&O jointly filed a reply in opposition to the petition for a cease and desist order.

The Arbitration Committee was convened pursuant to section 4 of the *New York Dock* conditions (*New York Dock Ry.- Control -Brooklyn East. Dist.*, 360 I.C.C. 60 (1979)), imposed by this Commission in *CSX—Control*, 363 I.C.C. 521 (1980) and section 4 of a November 3, 1966 merger protective implementing agreement (Orange Book agreement) between certain predecessors of CSX, the former Seaboard Air Line Railroad Company and the Atlantic Coast Line Railroad Company and various labor unions including BRC. In an opinion and award dated March 23,

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[1] BRC has also sought review of the Arbitration Committee opinion and award in a cross-complaint.

1987, the Arbitration Committee directed the parties to adopt an implementing agreement governing the proposed consolidation of CSX's freight car heavy repair facilities at Waycross, GA and Raceland, KY. Under the implementing agreement imposed by the Arbitration Committee, the Waycross facility would be closed and its work transferred to Raceland. However, employees entitled to the benefits of the Orange Book agreement could not be compelled to transfer to Raceland.

The carriers have petitioned this Commission to reverse that aspect of the Arbitration Committee award which prohibited them from requiring Orange Book protected employees to transfer from Waycross to Raceland. Nevertheless, on May 14, 1987, CSX formally advised BRC that the implementing agreement imposed by the arbitration award of March 23, 1987, would become effective on May 26, 1986, and that the anticipated date for implementing the coordination was June 8, 1987. BRC is concerned that employees exercising their Orange Book rights could be deprived of their jobs as well as their protection should the carriers be allowed to implement the arbitration award while, at the same time, continuing their efforts to reverse a part of it. BRC notes that should the carriers be successful in reversing the employee Orange Book rights recognized in the Arbitration award, affected Orange Book employees would have no opportunity to bid for Raceland jobs. As a result of the implementation of the coordination, employees junior to the Orange Book employees could be expected to fill the available positions at Raceland.

Without necessarily deciding whether we have the authority to issue a cease and desist order in the present situation, but assuming we have that authority, we conclude that there is insufficient reason for the issuance of such an order in this matter. In deciding whether a cease and desist order is justified we will use the criteria for reviewing stay requests as set forth in *Washington Metropolitan Area Transit Comm'n.* v. *Holiday Tours, Inc.*,

559 F.2d 841 (D.C. Cir. 1977). Even if the position of BRC should ultimately prevail in this proceeding, BRC has not shown that either Orange Book employees or non-Orange Book employees will be irreparably injured absent a stay. The Orange Book employees currently working at Waycross may remain at their present location in a fully protected status.[2] If they elect to move to Raceland and the BRC prevails, they will return to Waycross without loss of seniority rights. Arrangement can be made for reimbursement of any expenses the employees incur in those movements. Non-Orange Book employees may move to Raceland and, if the BRC prevails, may return to Waycross and be restored to their former status, and arrangements can be made to reimburse those employees for any expenses they incur. Non-Orange Book employees who remain in Waycross will not be discharged, and may exercise their seniority rights to bid on the non-heavy repair work that will remain at Waycross. As the carriers concede, this Commission can make the non-Orange Book employees whole for any monetary losses they would suffer if BRC prevails.

In contrast, granting the cease and desist order would harm the carriers because they would be precluded from realizing the efficiencies that consolidation of the two repair facilities would produce.

BRC has also not demonstrated that it will likely prevail before the Commission in this proceeding. BRC has also failed to show that the public interest favors a stay. The Commission, in its decisions authorizing the acquisitions of control in F.D. No. 28905 and F.D. No. 21215, found that coordination of the carriers is in the public interest. The economies realized by this coordination will benefit the carriers and the shipping public. To stay the transfer would

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[2] Indeed, in their reply, the carriers indicate that they will hold open a sufficient number of positions at Raceland to accommodate Orange Book employees.

delay these economies that have already been shown to be in the public interest.

It is not necessary now to deal with the motion to dismiss and therefore we will hold it under advisement.

This action will not significantly affect the quality of the human environment or energy conservation.

It is ordered:

1. The motion to dismiss the petition for administrative review of the Arbitration Committee opinion and award is held under advisement.

2. The petition to order CSX to cease and desist from implementing the described coordination is denied.

3. This decision is effective on the date of service.

By the Commission, Chairman Gradison, Vice Chairman Lamboley, Commissioners Sterrett, Andre, and Simmons. Commissioner Sterrett did not participate.

Noreta R. McGee
Secretary

(SEAL)

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

March 26, 1990

Mr. Jeffrey S. Berlin
2300 N Street, N.W.
Suite 625
Washington, DC 20037

Re: Norfolk and Western Railway Company, et al.
v. American Train Dispatchers Association, et al.,
No. 89-1027
CSX Transportation, Inc.
v. Brotherhood of Railway Carmen, et al.
No. 89-1028

Dear Mr. Berlin:

The Court today entered the following order in each of the above entitled cases:

The petition for a writ of certiorari is granted.

The cases are consolidated and a total of one hour is allotted for oral argument.

Very truly yours,

Joseph F. Spaniol, Jr., Clerk